

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

EMERY M. JORDAN,  
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DOCKET NUMBER  
SE07528710193

MAR 25 1988

DATE: \_\_\_\_\_

Emery M. Jordan, Balibago, Angeles City, Republic  
of the Philippines, pro se.

Captain Ariane L. DeSaussure, Esquire, APO San  
Francisco, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The agency has petitioned for review of an initial decision that reversed the agency's action removing the appellant effective March 20, 1987, from the position of Secretary (Typing), GS-4, at the Regional Medical Center (RMC), Clark Air Force Base, Republic of the Philippines. The appellant has cross petitioned for review of the initial decision. For the reasons set forth below, the Board GRANTS the agency's petition for review under 5 C.F.R. § 1201.115.

The Board DENIES the appellant's cross petition for review of the initial decision because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REVERSES the initial decision and SUSTAINS the agency's action removing the appellant.

### BACKGROUND

The appellant's removal was based on a charge that, from March 1984 through March 1985, he committed off-duty black marketing of motor vehicles. Specifically, the agency alleged that an Office of Special Investigations (OSI) Report, dated October 21, 1986, and released to the agency for use on December 17, 1986, revealed that the appellant set up a vehicle transfer operation, in violation of Clark Air Base Regulation (CABR) 30-3<sup>1</sup>, whereby on approximately seven occasions an authorized person acted as a buyer to purchase motor vehicles from tax-exempt select agency personnel and then turned the vehicles over to the appellant (or someone designated by him) for subsequent release to

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<sup>1</sup> The agency's regulations, CABR 30-3 Ch. 4-4, generally prohibit the sale, transfer, or other disposition of tax-exempt property to non-tax exempt persons in the Republic of the Philippines. CABR 30-3, Ch. 5-4 prohibits the sale or transfer of tax-exempt motor vehicles other than by completing the transaction without falsification at the agency's Merchandise Control Office where such transactions are recorded. See Initial Appeal File, Agency File, Subtab 8E.

non-tax-exempt Filipino local nationals who were not authorized to have the tax-free merchandise.<sup>2</sup>

The appellant petitioned for appeal to the Board's Seattle Regional Office, and requested a hearing. After affording the parties a hearing, the administrative judge issued an initial decision finding that: (1) The charge was supported by preponderant evidence; (2) the agency failed to show a nexus between the appellant's off-duty misconduct and the efficiency of the service because his ability to perform his duties was not impaired and he was permitted to perform the duties of his position in a superior manner for almost two years after his misconduct occurred; (3) no finding need be made with regard to the penalty imposed due to the agency's failure to show a nexus between the appellant's off-duty misconduct and the efficiency of the service; and (4) the appellant did not show that the agency violated his constitutional rights in conducting its investigation and effecting his removal. Thus, the administrative judge reversed the removal action based on the agency's failure to prove that the appellant's removal was for such cause as would promote the efficiency of the service.

The agency has petitioned for review of the administrative judge's nexus determination. The appellant has cross petitioned for review of the administrative judge's findings of fact in sustaining the charge of black marketing and his determination that the agency did not

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<sup>2</sup> See Initial Appeal File Volume I, Agency File, Subtab 3.

violate the appellant's constitutional rights in conducting its investigation of his misconduct and in effecting his removal.<sup>3</sup>

### ANALYSIS

#### The Appellant's Contentions

Upon full review of the record the Board finds that the appellant's arguments concerning the merits of the removal action constitute mere disagreement with the administrative judge's fact findings and credibility determinations. The administrative judge found that the testimony and documentary evidence submitted by the agency, primarily the evidence proffered by a disinterested civilian employee who unwittingly sold his motor vehicle to the black marketers and by two agency military personnel who knowingly participated in the appellant's black marketing scheme and were court-martialed for their offenses, showed that the appellant was the ringleader of a black market scheme in

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<sup>3</sup> The agency certified in its petition for review that it mailed a copy of the petition to the appellant on August 21, 1987. The appellant's cross petition for review was mailed in an envelope postmarked August 29, 1987, two days after the initial decision became final. The Clerk of the Board directed the appellant to show good cause for his apparently late filed petition. The appellant responded in a statement signed under penalty of perjury that he received a copy of the agency's petition for review on August 25, 1987, and he immediately prepared his own petition for review. The Board finds that the appellant filed a timely cross petition for review, since it was filed within twenty-five days of the date of service of the agency's petition for review. See 5 C.F.R. § 1201.114(b).

which he solicited agency personnel to transfer tax-exempt privately owned motor vehicles to non-tax-exempt Filipino nationals in violation of the agency's regulations. The appellant did not testify in his own behalf and did not rebut the agency's evidence. See Initial Decision at 4-6. Accordingly, the Board finds that the appellant has not shown any reason to disturb the administrative judge's findings and expressly explained credibility determinations. See *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). See also *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83, 87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case).

The administrative judge found from his review of the investigative materials submitted by the parties that the agency did not violate the appellant's constitutional rights in conducting its investigation so as to require reversal of the removal action, and that the agency's accumulated evidence showed that the appellant committed the charged misconduct. See Initial Decision at 7-8. The Board concurs in the determination of the administrative judge that the agency did not: (1) Violate due process; (2) effect the removal action without an adequate basis; (3) deny the appellant an opportunity to confront the witnesses against him; or (4) deny him equal protection of the laws in

affecting the removal action. The appellant's continued bare assertions of agency infringement of his constitutional rights does not form a basis for disturbing the administrative judge's findings of fact, *see Weaver*, 2 M.S.P.R. at 133-34, and conclusions of law. *See Vogel v. Department of Justice*, 9 M.S.P.R. 382, 389-90 (1982); *Stewart v. Department of Transportation*, 5 M.S.P.R. 57 (1981).

#### The Agency's Contentions

1. The agency showed by preponderant evidence a nexus between the appellant's off-duty misconduct and the efficiency of the service.

In *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987), the Board determined that an agency may show a nexus between off-duty misconduct and the efficiency of the service by demonstrating: (1) A rebuttable presumption in certain egregious circumstances; (2) the misconduct adversely affects the appellant's or coworkers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) the misconduct interfered with or adversely affected the agency's mission.

The Board concurs in the finding of the administrative judge in this case that the appellant's misconduct did not adversely affect his job performance. The Board finds by a preponderance of the evidence, however, that the appellant's misconduct interfered with or adversely affected the

agency's mission and affected the agency's trust and confidence in his job performance.

The testimony and documentary evidence submitted by the agency in this case established that the appellant was the ringleader of a black market scheme in which he solicited agency personnel to transfer tax-exempt privately owned motor vehicles to non-tax-exempt Filipino nationals in violation of the agency's regulations. Two agency enlisted military personnel were court-martialed for their participation in the appellant's black marketing scheme, and the record shows that at least one of them was imprisoned for twelve months and received a bad conduct discharge for his part in the scheme. In conducting the black market scheme, the agency's official Merchandise Control Records were falsified in order to conceal the improper transfer of the motor vehicles to non-tax-exempt Filipino nationals.<sup>4</sup>

Such actions, which resulted from the appellant's misconduct, interfered with or adversely affected the agency's mission. See Kruger, 32 M.S.P.R. at 74. The written statement of the appellant's immediate supervisor, who was the proposing official, and of the administrator of the Clark RMC, the appellant's second-level supervisor and the deciding official, show that the appellant's conduct adversely affected the agency's trust and confidence in his ability to perform his duties with confidentiality. This is

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<sup>4</sup> See Initial Appeal File Volume I, Agency File, Subtabs 8B, 8C, 8D, 8E; Initial Appeal File Volume II, Tab 14, Subtab 1.

particularly true since the appellant has access to personnel files and sensitive information and his job requires contact with the public and other agencies.<sup>5</sup> See *Kruger*, 32 M.S.P.R. at 74.

As we have previously held, an agency is not required to demonstrate a specific impact on the appellant's job performance or service efficiency to establish the requisite nexus. Rather, it is sufficient for an agency to establish that public perceptions of an employee's misconduct "would impair the efficiency of the agency by undermining public confidence in it, thereby making it harder for the agency's other workers to perform their jobs effectively ...." *Kruger*, 32 M.S.P.R. at 75. See *Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1131 (Fed. Cir. 1986). The Board also finds that the agency's showing of the requisite nexus for the removal action has not been denigrated by its delay in initiating the action. See *Kumferman v. Department of the Navy*, 19 M.S.P.R. 5, 7 (1984), *aff'd*, 785 F.2d 286 (Fed. Cir. 1986).<sup>6</sup> Further, the written statements of support by the appellant's co-workers

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<sup>5</sup> See Initial Appeal File Volume I, Agency File, Subtab 8F.

<sup>6</sup> Further, the Board finds that the agency reasonably delayed effecting the removal action until the OSI completed its investigation and released its report of the appellant's misconduct, in the absence of any showing by the appellant that such delay prejudiced his rights or his ability to defend himself against the charge. See, e.g., *Kumferman v. Department of the Navy*, 785 F.2d 286, 292 (Fed. Cir. 1986); *Cates v. Department of Agriculture*, 24 M.S.P.R. 468, 471 (1984), *aff'd*, 776 F.2d 1065 (Fed. Cir. 1985); *Wilkes v. Veterans Administration*, 6 M.S.P.R. 732, 734 (1981).

and his satisfactory job performance during the period that the agency delayed effecting the removal action do not alone outweigh the agency's legitimate apprehension as to his continued employment and the effect of his proven misconduct on the efficiency of the service. See, e.g., *Allred*, 786 F.2d at 1131-32; *DeDonato v. United States Postal Service*, 25 M.S.P.R. 286, 291 (1984), *aff'd* in part and vacated in part on other grounds, 785 F.2d 320 (Fed. Cir. 1985); *Quander v. Department of Justice*, 22 M.S.P.R. 419, 422 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985). Therefore, the Board finds that the agency has shown by a preponderance of the evidence a nexus linking the appellant's off-duty misconduct with the efficiency of the service. See *Kruger*, 32 M.S.P.R. at 76.

2. The penalty of removal is within tolerable limits of reasonableness.

In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), the Board held that the purpose of its review of the agency's selection of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within tolerable limits of reasonableness. The Board also compiled a partial list of factors relevant to the Board's determination of the appropriateness of the penalty. *Douglas*, 5 M.S.P.R. at 305-06.

The agency here submitted a signed statement by the deciding official certifying that he considered the

following Douglas factors in reaching his decision to remove the appellant: (1) The serious, intentional, and repetitive nature of the appellant's black marketing misconduct, which resulted in financial gain; (2) his duties and responsibilities as Secretary to the Clark RMC medical squadron section commander required a great deal of public contact with squadron personnel and other base agencies; (3) his lack of a prior disciplinary record; (4) his approximately three and one-half years of superior performance with the agency; (5) management's lack of trust in his ability to perform his duties with confidentiality, since the appellant has access to personnel files and sensitive information; (6) the penalty of removal was consistent with the agency's table of penalties; (7) the impact that the appellant's misconduct may have on the agency's reputation in the eyes of the Philippine nation; (8) the appellant's familiarity with the agency's regulations and merchandise control procedures; (9) his lack of potential for rehabilitation; (10) the lack of mitigating circumstances or provocation by others for his misconduct; and (11) the inappropriateness of alternative sanctions.<sup>7</sup>

Our review of the record shows that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within tolerable limits of reasonableness. See Douglas, 5 M.S.P.R.

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<sup>7</sup> See Initial Appeal File Volume I, Agency File, Subtabs 8A, 8F.

at 306. Accordingly, the Board will not disturb the agency's selection of the penalty of removal in this case.

ORDER

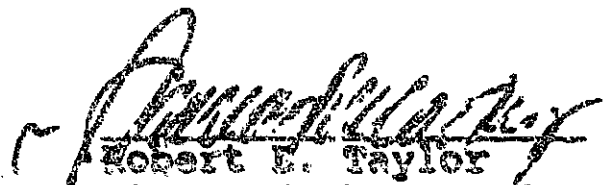
This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board